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Supreme Court U.S.
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No. 05-1366

IN THE

# Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

*Petitioner,*

*v.*

LIONEL SIMON dba LIBERTY PAPER COMPANY,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR**

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Did the California court decide a substantial federal question in finding, as a matter of fact, that the private contract entered into between the parties required respondent to sequester the disputed funds but did not require respondent to pay interest to petitioner?

(2) Did the California court decide a substantial federal question in exercising discretion under Cal. Code of Civ. Proc. § 908 and finding, as a matter of fact, that petitioner had already been placed in the same position it was before payment of the principal amount and was thus not equitably entitled to interest?

(3) Did petitioner timely and properly raise a substantial federal question?

(4) Do procedural rules, which have historically allowed courts to exercise discretion in awarding interest on restitution claims, violate the Fourteenth Amendment?

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Respondent Lionel Simon d.b.a. Liberty Paper Company ("Simon") submits this brief in opposition to the Petition for Writ of Certiorari filed by San Paolo U.S. Holding Company, Inc. ("San Paolo") seeking review of the California Court of Appeal unpublished decision in *Simon v. San Paolo*, No. B121917 (California Court of Appeal, Second District, November 8, 2005).

The narrow issues presented in this case arose out of a unique set of factual circumstances, decided entirely on the basis of California decisional and statutory law.

The California Court of Appeal found, as a matter of fact, that the parties had entered into a contract with each other to sequester a disputed sum of money, representing a punitive damage award against San Paolo, while an appeal was pending. The California Court further found that this contract did not provide for payment of interest to San Paolo in the event it was successful in its appeal.

Further, restitution is, traditionally, an equitable concept. In California, as in other state and federal courts, a court will generally have discretion to award interest, based on equitable factors. Here, the California court exercised its discretion and considered the following factors: Simon did not have use of the sequestered funds during the pendency of the appeal; Simon would not have been entitled to additional interest if he, and not San Paolo, had been successful; and, San Paolo should not be placed in a better position than it would have been had it not defrauded Simon. Rather, the California court made a finding of fact that San Paolo was placed, as far as possible, in the same position it was before entering into the contract with Simon to sequester the disputed funds.

Based on the above, it can be seen that the California court decided the issue entirely on adequate and independent state grounds, and did not decide a substantial federal question. The California court never touched upon the Fourteenth Amendment or any due process argument, nor was it asked to – petitioner did not raise any due process issue in a proper or timely manner, or at all.

Finally, the relief San Paolo requests cannot be granted. There is no support for the contention that in all cases of restitution, an award of interest (at ten percent per annum) is constitutionally mandated or that traditional notions of equity and court-exercised discretion violate the Fourteenth Amendment. The Petition for Writ of Certiorari is premised upon the argument that it is "necessary for this Honorable Court to grant certiorari in order to settle this conflict and provide guidance and uniformity" among the state and federal courts with respect to when, and under what circumstances, interest will be awarded. But every state, appropriately and historically, has determined for itself under what circumstances interest has been awarded, the appropriate rate of interest, and whether the award of interest will be mandatory, discretionary, or not awarded at all. As this Court recognized over 100 years ago, the states are free to enact and apply rules regulating the payment of interest where, as here, there is no argument that the exercise of discretion was arbitrary, or capricious, or selectively enforced; or that the statute is unconstitutionally vague or indefinite and where petitioner received adequate notice and had an opportunity to be heard.

## STATEMENT OF THE CASE

### Factual Background

**a. *Trial***

On June 12, 1996, San Paolo and Simon executed a letter of intent agreeing to all essential terms with respect to the sale of uniquely situated real property. San Paulo advised Simon that the agreement was binding. At trial, Simon introduced evidence that the letter of intent was originally drafted with an express statement to that effect, but was later fraudulently altered by San Paolo. The agreement also contained a provision whereby Simon and San Paolo agreed to exclusively negotiate with each other.

Simon incurred significant costs in consummating the transaction. San Paolo then breached the contract in bad faith, secretly negotiating the sale of the property with another buyer. The trial was replete with numerous details of San Paolo's fraudulent representations, and subsequent coverup.

On June 21, 1996, Simon filed its complaint against San Paolo for *inter alia*, false promise and breach of contract. The first trial resulted in a verdict in favor of Simon, the jury finding fraud against San Paolo, and awarding compensatory damages in the amount of $5,000. Simon's actual loss was approximately $400,000, because he contracted to buy the property for $1,100,000 and it was worth $1,500,000. But California law does not permit recovery of "loss of benefit of the bargain" damages in real estate transactions such as this one. Cal. Civ. Code § 3343.

By clear and convincing evidence, the jury also found that San Paolo was guilty of malice, oppression or fraud and awarded punitive damages in the amount of $2,500,000. The trial court granted San Paolo's motion for new trial on the issue of punitive damages only.

On March 9, 1998, the second trial commenced, and the second jury to hear this case returned a verdict of $1,700,000 in punitive damages. This finding and award was confirmed by the trial judge under a de novo review. Cal. Code Civ. Proc. § 657.

**b.** ***Appellate Review 1996-2001***

On August 28, 2000, the California Court of Appeal affirmed the award of punitive damages, and San Paolo's Petition for Rehearing was denied.

San Paolo filed a petition for review to the California Supreme Court, which was denied *en banc*, December 13, 2000.

The decision became final under California law, and Simon properly made demand on San Paolo's surety for payment on San Paolo's undertaking.

San Paolo then sought a writ of certiorari before this Court and sought an immediate stay of execution by this Court, which was initially granted. Simon presented opposition, providing evidence that San Paolo's surety, Amwest Surety Insurance Company, had been downgraded, and thus there was a concern that any delay in collection might result in Simon not getting paid when the case was finally resolved. At that time, San Paolo had already liquidated all of its assets.

Upon that showing, this Court vacated the stay, whereupon Simon had the unconditional right to demand that the surety pay him the total judgment without restriction.

But San Paolo did not want the surety to pay the judgment and did not want to post another bond with a financially sound

surety, which would have supported the request for a stay. Desiring to amicably resolve the issue to the satisfaction of both parties, Simon negotiated the "2001 Deposit Agreement" with San Paolo.

Under that agreement, San Paolo offered to pay the judgment subject to two conditions. One of those conditions required proof that the funds would be deposited into an insured deposit account. The other condition provided as follows:

> . . . Mr. Simon will continue to refrain from transferring, dispersing, or otherwise dissipating the funds paid to him under the Judgment until the action is finally resolved.

(Letter of San Paolo's counsel May 2, 2001.)

The purpose of this condition was to ensure that a fund would be available for San Paolo to be repaid if the case was reversed or modified. Simon accepted this offer and, as the Court of Appeal recognized, fulfilled the special conditions.

San Paolo did not negotiate for, and did not obtain, an agreement to place the money in an interest bearing account. San Paolo did not negotiate for, and did not obtain, an agreement on Simon's part to pay interest at ten percent, at seven percent, or at any percent. Rather, San Paolo negotiated for, and obtained, an agreement to have the funds secured in an insured deposit account.

This agreement benefitted both parties. It protected Simon from the risk of not being paid by San Paolo – then in liquidation and unwilling to post a bond – if the decision was affirmed. And, in the event Simon had to repay the judgment to San Paolo, San Paolo would look solely to the

deposited funds. In exchange, Simon gave up the right to use the money, or to invest in a manner yielding a higher return. Indeed, had San Paolo made the payment conditioned on ten percent interest, Simon would never have entered into the agreement, would have simply demanded full payment from the surety and would have had the use of the money without restriction.

The agreement also benefitted San Paolo. If the judgment was reversed or modified, San Paolo had the security of knowing the amount it deposited would be repaid and not dissipated by Simon. Thus, San Paolo was not "forced by a court" to pay the punitive damage award, as misrepresented to this Court by San Paolo. (See Petition for Writ of Certiorari; question presented (ii).) It did so pursuant to a contract to which it had voluntarily agreed.

On May 29, 2001, this Court granted review, vacated the opinion of the California Court of Appeal, and remanded, without argument, directing the appellate court to reconsider the decision in light of *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) .

**c. *Appellate Review 2001-2006***

On November 7, 2001, the Court of Appeal affirmed the award based on a de novo review of the reasonableness of the award. On February 20, 2002, the California Supreme Court again rejected San Paolo's petition for review.

On May 20, 2002, San Paolo filed a second petition for writ of certiorari before this Court. On April 21, 2003, this Court remanded the case for review in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

On December 2, 2003, the Court of Appeal again affirmed the award in a published opinion, finding that San Paolo's conduct was "reprehensible" and that it was permissible to consider the "actual harm" suffered by plaintiff in calculating the *Campbell* punitive damage ratio. As noted above, the "actual harm" suffered by Simon as a result of San Paolo's deceitful conduct exceeded $400,000.[1]

A petition for rehearing was rejected. However, on March 24, 2004, the California Supreme Court granted San Paolo's third petition for review and, on June 16, 2005, issued its opinion, finding that only legally compensable damages could be considered in analyzing the *Campbell* ratio. The California Supreme Court reduced the award of punitive damages from $1.7 million to $50,000.[2]

After that opinion was issued, Simon immediately tendered to San Paolo the total amount paid by San Paolo pursuant to the 2001 Deposit Agreement, less the amount of the final judgment. The final judgment in favor of Simon was $95,889.91. That amount included interest through the date of the original payment in 2001.[3] San Paolo rejected the tender and demanded an additional $900,000 in "interest."

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1. *Simon v. San Paolo U.S. Holding Co., Inc.*, previously published at 113 Cal. App. 4th 1137, 7 Cal. Rptr. 3d 367 (2003).

2. *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159 (2005).

3. The original judgment was for $1,705,000. Costs had been agreed to pursuant to stipulation at $18,374.80. The new judgment was for $55,000 in principal, $22,505.01 in interest – from April 8, 1998 through May 2, 2001 (1,120 days) – when San Paolo originally paid the judgment amount. Simon provided a credit to San Paolo of an additional $20,000 arising out of San Paolo's contribution to a settlement with the broker, leaving a balance of $2,156,304.20.

As a result of that demand, Simon filed a motion before the California Court of Appeal, where jurisdiction was then pending, for a determination of the parties' rights and obligations regarding interest. Prior to filing the motion, San Paolo and Simon negotiated yet another agreement by which San Paolo accepted the tender of $2,156,304.20 subject to a reservation of rights as to its demand for interest.

The Court of Appeal, after adequate notice to the parties and extensive briefing on all of the issues, including supplemental briefing, ultimately denied San Paolo's demand for additional interest. A petition for rehearing was denied, and San Paolo petitioned the California Supreme Court for review, which petition was denied on January 25, 2006.

## NO FEDERAL QUESTION WAS DECIDED

A substantial federal question is necessary to invoke the certiorari jurisdiction of the Supreme Court. 28 U.S.C. § 1257(a); *Angel v. Bullington*, 330 U.S. 183 (1947); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902); *Zucht v. King*, 260 U.S. 170 (1922).

"Review on a writ of certiorari is not a matter of right, but of judicial discretion" and a petition "will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Under Rule 10(b), this Court may consider whether a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeal. This Court may also consider whether a state court has decided an important federal question that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Rule 10(c).) These Rule 10 considerations are not present here.

The California Supreme Court did not decide a federal question, important or otherwise, nor did the California Court of Appeal. Rather, the Court of Appeal decided a question of contract interpretation under California common law and, as an alternative basis for the ruling, the Court of Appeal decided a question arising under California statutory law – namely, Cal. Code of Civ. Proc § 908 (hereafter "section 908"). It follows that the California Court of Appeal decision, as affirmed by the California Supreme Court, does not conflict with decisions of another state court or the United States court of appeal, or any relevant decision of this Court, because no other court has jurisdiction over interpretation of the California decisional law and statutes at issue.

Apparently recognizing the above, San Paolo suggests three bases for federal jurisdiction here: the fact that the punitive award was reduced after remand from this Court; application of the National Bank Act (12 U.S.C. § 91); and due process constraints of the Fourteenth Amendment. As set forth below, the California courts did not decide any issue relating to these purported bases for jurisdiction.

## NO FEDERAL QUESTION ARISES BY VIRTUE OF THE BASIS UPON WHICH THE VERDICT WAS REDUCED

The fact that this particular case involved a reduction of a punitive damage award, based on a federal constitutional question recently decided by this Court, is irrelevant to the issue presented now. San Paolo cites no authority for the proposition that the certiorari jurisdiction of this Court does – or should – extend to every aspect of a case once the Constitutional issue raised has been finally resolved.

Further, section 908 is applicable to any restitution-after-appeal claim in California. The application of the rule has no relationship to *why* restitution was ordered.

## THE STATE COURT DID NOT DECIDE ANY ISSUE ARISING FROM THE NATIONAL BANK ACT

While the California Court of Appeal asked for briefing on whether the National Bank Act applied, San Paolo denied that it was subject to the Act, and denied that the Act applied. The Court of Appeal agreed, stating that the Act was unhelpful to its analysis. Based on its earlier position, San Paolo should be judicially estopped from asserting that the Act applies. In any event, the Act, if it did apply, would have simply provided another equitable factor *against* San Paolo's demand for interest for the court to have considered in exercising its discretion. Finally, nothing in the Act, itself, purports to preempt the discretionary aspect of section 908, and San Paolo cites to no such provision.

## THE STATE COURT DID NOT DECIDE ANY ISSUE ARISING FROM THE FOURTEENTH AMENDMENT BUT RESTED ITS DECISION ON ADEQUATE AND INDEPENDENT STATE GROUNDS

Although San Paolo suggests that the above issues might give rise to a basis for certiorari jurisdiction, San Paolo concentrates on the argument that section 908 is facially unconstitutional. The principal question presented by San Paolo's petition is whether the Fourteenth Amendment requires states to enact mandatory, not discretionary, interest statutes following restitution after a reversal on appeal. The California court did not decide this question, but simply applied California law. This Court will not review state court decisions that rest on independent and adequate state grounds. *Fox Film Corp. v. Muller*, 296 U.S 207 (1935). The Court has no power to review state determinations of purely state law. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986). Matters of state law are not the court's concern. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). Rather, the state courts are the appropriate tribunals to decide

issues of purely state law. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 618 (1875).

A review of the Court of Appeal decision demonstrates that the court did not address the question of whether section 908 violated the Fourteenth Amendment. Nor, was it asked to. Rather, the Court of Appeal interpreted and applied section 908, which provides as follows:

> When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for a determination.

The California court properly rejected San Paolo's argument that it was inequitable for it not to be compensated for the loss of use of the money. San Paolo argued to that court, as it does to this Court, that it only paid the judgment because Simon threatened to execute on the judgment, and refused to accept a bond. But, the Court of Appeal found that "San Paolo's own evidence and opposition to the motion casts doubt on this contention." The court noted that in a July 3, 2001, letter from San Paolo's counsel to Simon's counsel, San Paolo agreed to post a bond in the same amount as previous bonds, but only in exchange for the return of the

judgment amount paid by San Paolo **plus ten percent interest** from the date of the payment. Since, as the court recognized, there was no circumstance under which San Paolo would be entitled to ten percent interest, this offer was no offer at all.

Although San Paolo argued that Simon "demanded" San Paolo pay the money, that Simon kept and profited from the use of the money, and that Simon refused to accept San Paolo's repeated offers to post a new appeal bond, the Court of Appeal found this version of the facts to be false. Instead, the Court of Appeal found that the parties had voluntarily entered into a contract to resolve the issue of what should happen to the money while the appeal was pending. In fulfillment of the terms of that contract, Simon secured the money in a insured deposit account, and did not have the use of the money. This finding was based on letters between counsel documenting the contract. San Paolo's strategy, here and in the state court, has been to simply ignore the existence of the contract. In light of the clear evidence of such an agreement, San Paolo's credibility with the California Court of Appeal was strained, a factor the court was also entitled to consider in exercising discretion.

The Court of Appeal also rejected, as a factual matter, San Paolo's suggestion that Simon wrongfully refused to make restitution upon reversal of the judgment. Rather, the court correctly found, on the facts presented to it, that Simon promptly attempted to make restitution, even before the remittitur issued on July 21, 2005, and that it was San Paolo who rejected that tender, returned the check, and, again, wrongfully demanded interest at the rate of ten percent per annum.

These highly fact intensive issues, upon which the Court of Appeal decision rested, cannot be of any concern to this Court.

The Court of Appeal further recognized that Simon himself could not have recovered prejudgment interest on the punitive damages, since under California law, prejudgment interest is not allowed on punitive damages. *Citing, Lakin v. Watkins Associated Ind.*, 6 Cal. 4th 644, 662, 664 (1993). The Court noted that Simon would not even have been able to recover prejudgment interest on compensatory damages under California law, unless such damages were subject to calculation. (Cal. Civ. Code § 3287). In this case, the amount to be restored to San Paolo was not calculable prior to the reversal by the California Supreme Court. Mutuality of remedy is an equitable factor which a court may, rationally, consider.

The Court of Appeal also interpreted California decisional law, specifically *Textron Financial Corp. v. National Union Fire Insurance Co.*, 118 Cal. App. 4th 1061 (2004) and decided that it was proper under section 908 to consider the despicable conduct underlying the punitive award in the first instance. San Paolo had argued that *Textron* could be read to prohibit consideration of the underlying conduct. However, the Court of Appeal correctly noted that *Textron* did not so hold. *Textron* simply stated that denying interest to a defendant would be inequitable if based *solely* upon consideration of the defendant's conduct that gave rise to the liability in the first place. *Textron* did not hold it was *never* proper to consider the conduct of a defendant in the underlying case. The reviewing court should decide whether to award interest in light of long established principles of equity. As the *Textron* court said: "Our power to award interest under Code of Civ. Proc. § 908 is discretionary and may be denied if to do so would be inequitable under the circumstances." *Holmes v. Williams*, 127 Cal. App. 2d 377, 379 (1954).)

The Court of Appeal then correctly considered that no salutary purpose would be served by imposing interest as damages upon Simon. The court concluded, as a matter of fact and "so far as possible," that Simon's tender, on July 15, 2005, in the amount of $2,156,304 returned the parties to the positions they occupied before San Paolo's payment of the judgment. The court also concluded that satisfying San Paolo's demand would reward San Paolo – the tortfeasor, guilty, by clear and convincing evidence, of oppression fraud or malice – with a judgment of nearly $1,000,000 against the victim of its fraudulent conduct. Obtaining a nearly million dollar benefit is "clearly not [San Paolo's] position prior to the satisfaction of the judgment."

The factual determination that San Paolo has been placed in the same position it was at the time of the payment of the judgment is not assailable in this Court. Therefore, in order to disturb the judgment, this Court would have to rule that the Fourteenth Amendment requires that a party who has been returned to the position it occupied before payment of a judgment, is nonetheless entitled to a *bonus*. San Paolo cites no authority that supports this startling proposition.

Most significantly for purposes of this Opposition, it is clear from the above, and from the decision itself, that the matter was decided entirely on independent and adequate state grounds and no substantial federal question was addressed.

## NO FEDERAL QUESTION WAS RAISED IN THE STATE COURT

A substantial federal question must have been raised in a proper and timely manner in the state court. While no particular form of words or phrases is essential, the claim of invalidity and the ground upon which petitioner relies must be brought to the attention of the state court with "fair

precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 581-585 (1969).

This Court traditionally has refused to consider federal questions raised for the first time before the Court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The Court only reviews federal questions which have been "pressed or passed upon" by state courts, with very rare exceptions. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-219 (1983). As set forth above, a review of the California Court of Appeal decision plainly shows that no federal question was presented or decided.

San Paolo did not argue the application of the Fourteenth Amendment to the state court. In the Petition for Writ of Certiorari, San Paolo identifies the issues raised in the state court and due process is not included. (Pet. for Writ of Cert., p. 11-12.) This is dispositive.

San Paolo disingenuously claims that it "relied on federal authority." (Pet. Writ of Cert., p. 13.) But the federal cases cited by San Paolo to the California court, and to this Court, do not hold that state rules which allow discretion in awarding interest on restitution claims violate the Fourteenth Amendment, and were never cited by San Paolo for this purpose. These cases do not, moreover, support the exercise of certiorari jurisdiction now.

For example, the jurisdiction of this Court in the case of *Baltimore & O.R. Co. v. U.S.*, 279 U.S. 781 (1929) was expressly conferred by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, and appeal was from a judgment of the United States District Court for the Northern District of Illinois. Importantly, this Court recognized that the restitution question presented there was "in effect an

equity proceeding" and that the lower court should have issued an opinion, cited to authority, set forth its statement of reasons for denying restitution, and referred the question to a master to ascertain the amount of restitution. While this Court did state that the amount awarded *in that case* should include interest ("at the rate established by the law of the state in which sums were paid,") nothing in this opinion remotely supports the argument that interest on amounts paid in restitution is Constitutionally mandated.

In *Moore v. Drewy and Associates, Inc.*, 945 F. Supp. 117 (E.D. Va. 1996), a contract action was filed in the United States District Court for the Eastern District of Virginia. Virginia substantive law applied. The district court ruled in favor of plaintiff. Defendants appealed to the Fourth Circuit Court of Appeal. One of the defendants did not post a supesedeas bond to prevent collection. Plaintiff executed upon the judgment while the appeal was pending. The Fourth Circuit certified a particular issue to the Virginia Supreme Court and then reversed the judgment. Defendant moved for an order of restitution for the judgment previously paid. Plaintiff claimed that defendant, in order to recover the funds, would have to file a new complaint.

Based on federal decisional law, and the equitable power to make restitution which "lies within the inherent equitable jurisdiction" of courts, the district court ordered restitution. No issue of due process was raised or decided in this case. Rather, *Moore* supports Simons' position that discretionary restitution rules, which are grounded in equity and are intended to return the parties to status quo, are not unconstitutional.

The *Moore* court also decided that it was equitable to award interest (at the federal post-judgment rate) – *because* plaintiff "has had the use of this money since it was received." (*Id.* at 122.) In contrast, the California Court of Appeal found,

as a matter of fact, that Simon did *not* have the use of the money and therefore it would be *inequitable* to require Simon to pay interest. Even if there could be a "conflict" between a federal court applying federal decisional law and a California court applying California statutory and decisional law, there is no conflict here. Both the *Moore* court and the California court recognized the discretionary, equitable nature of restitution. The different result is explained by different facts.

Similarly, in *Globe Indemnity Co. v. Puget Sound Co., Inc.*, 154 F.2d 249 (1946), the Second Circuit Court of Appeal held that the party who "*had the use of this sum*" during the relevant period should pay interest. The court further stated that "*in the situation here presented*" – i.e., where the party had the use of the money – the award of interest was not discretionary. In context, the *Globe Indemnity* court clearly meant that the district judgment had abused its discretion. There is no good faith argument that the *Globe Indemnity* court created a constitutionally mandated rule that interest *must* be awarded in all cases of restitution after appeal. There is no mention in the opinion of due process or the Fourteenth Amendment. Rather, the court found it was "just" to award interest in that particular case, recognizing the inherently equitable – not Constitutional – basis for the holding. (*Id.* at 250.)

Again, Simon, unlike the party in *Globe*, did not have the use of the money – as a direct result of the conditions imposed by San Paolo upon the sequestering of the funds.

Perhaps the most far-fetched of the citations brought to this Court's attention by San Paolo is *United States v. Jaffe*, 314 F. Supp. 2d 216 (S.D.N.Y. 2004). The case concerned the proper rate of interest applicable to a convicted criminal's sentence of restitution for violation of 18 U.S.C. § 1014. The court interpreted the Mandatory Victim Restitution Act

of 1996, 18 U.S. C. §§ 3663A(a)(1); 3663A(c)(1)(A)(ii); 3664(f) (1)(A); 3663(a)(1)(A); 3664(f)(2); and N.Y.C.P.L.R. § 5004. (*Id.* at 223-224.) *Jaffee* is wholly inapplicable.

## THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT PROCEDURAL RULES WHICH HAVE HISTORICALLY ALLOWED COURTS TO EXERCISE DISCRETION

Whether the California Court of Appeal's exercise of discretion in this case was merely erroneous obviously presents no federal question. San Paolo does not even argue that the exercise of discretion was arbitrary, capricious, or selectively enforced; or that the statute is unconstitutionally vague or indefinite; or that San Paolo did not receive adequate notice or the opportunity to be heard.

Instead, San Paolo argues for a "uniform" rule mandating an award of interest in all cases of restitution after a judgment has been paid pending appeal. In other words, San Paolo must show that the Fourteenth Amendment *prohibits* procedural rules which have historically allowed state and federal courts to exercise discretion in determining whether interest should be awarded on restitution claims, following an appellate reversal, even where the defendant has already been put in the same position it occupied before payment of the money.

Nothing in the Fourteenth Amendment or in Due Process jurisprudence supports San Paolo's argument.

The Fourteenth Amendment, in relevant part, provides that a State shall not deprive any person of property, without due process of law. Property interests are not created by the Constitution, but rather by an independent source, such as state law, or contract. *Munson v. Friske*, 754 F. 2d 683 (C.A. Wis. 1985); *Harrison v. Housing Auth. of City of College*

*Park*, 445 F. Supp. 356 (D.C. Ga. 1978); *aff'd* 594 F. 2d 863; *Sullivan v. Brown*, 544 F. 2d 279 (C.A. Tenn. 1976). Here, state law does not afford petitioner a property right to interest in this situation, and the Fourteenth Amendment is not implicated.

This proposition, in the context of state rules governing entitlement to interest, was expressly recognized by this Court in *Morley v. Lake Shore & M. S. Ry Co.*, 146 U.S. 162 (1892), where this Court long ago held that the allowance of interest is a matter within the legislative discretion of a state. This Court further held that where the claims of a citizen under a state statute regarding interest have been adjudicated by the highest court of that state, the citizen is not deprived of property without due process of law. San Paolo did not cite this Court to *Morley* – prior authority of this Court, on point, rejecting its present argument.

*See also Nichols v. T.I.M.E.*, 373 F. Supp. 811 (E.D. Okl. 1973) (Oklahoma statute providing for prejudgment interest when court accepts jury verdict and renders judgment is not unconstitutional taking of property without due process of law); *Laudenberger v. Port Authority of Allegheny County*, 436 A. 2d 147, 496 Pa. 52 appeal dismissed 456 U.S. 940 (1981) (Pa. Rule of Civ. Proc. § 238 pertaining to prejudgment interest where defendant does not make sufficient offer to settle is not unconstitutional taking of property without due process); *Mitchell v. Flandro*, 96 Idaho 236, 526 P. 2d 841 (Idaho 1974) (where judgment creditor given permission to contest calculation of interest under Idaho law, no due process violation).

Further, federal law, in various contexts, provides for discretionary awards of interest. *See, e.g., Dishman v. UNUM Life Ins. Co. of America*, 269 F.3d 974, 988 (9th Cir. 2001); *Shaw v. International Assoc. of Machinists*, 750 F.2d 1458

(9th Cir. 1985) (whether to award prejudgment interest under ERISA is a question of fairness, lying within the court's discretion, to be answered by balancing the equities); *Grosz-Salomen v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001) (post-judgment rate of interest under ERISA depends on equities of that particular case). Thus, prohibiting the state courts from exercising discretion, while the federal courts continue to do so, will not promote "uniformity."

## THE CALIFORNIA COURT DID NOT DECIDE ANY SUBSTANTIAL FEDERAL QUESTION RELATING TO THE RATE OF INTEREST

San Paolo also argues in support of a federally mandated rate of interest of ten percent, applicable to all states and to federal courts – presumably for all purposes. This is a particularly odd argument since ten percent is not even the federal rate of interest. 28 U.S.C. § 1961 ("equal to the weekly average one-year contract maturity Treasury yield").

The California Court of Appeal correctly observed that the ten percent interest San Paolo demands is an amount that accrues, under California law, only upon judgments. Cal. Code of Civ. Proc. § 685.010. The maximum permissible rate of interest, prejudgment, is seven percent. Cal. Const., art. XV, § 1. Under California law, prejudgment interest may be recovered from a tortfeasor from the date when the damages are readily ascertainable. Cal. Civ. Code § 3287. Prejudgment interest is not allowable when the amount of damages is not readily ascertainable, but must be resolved by accord, verdict or judgment. In this case, the California Court of Appeal correctly recognized that Simon is not a tortfeasor, and the amount of "damages" (restitution) that would ultimately have to be paid to San Paolo was never ascertainable until the moment the California Supreme Court finally ruled.

As recognized by the Court of Appeal, the interest actually earned on the deposited funds was less than two percent, and the maximum legal rate on a debt not reduced to judgment is seven percent. Cal. Const., art. XV, § 1, Cal. Code of Civ. Proc. § 685.010. (Court of Appeal Opinion, fn. 4.)

Thus, in no way did the California Supreme Court, or the California Court of Appeal, decide, or even touch upon, any federal question relating to the proper rate of interest, nor did San Paolo argue for a constitutionally mandated interest rate of ten percent. Rather, as is apparent from reading the Court of Appeal decision, the issue was decided on adequate state grounds and was decided exclusively upon those grounds.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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